RECORD AND BRIEFS

ORIGINAL

No. 15-8544

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

TRAVIS BECKLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

In Johnson v. United States, 135 S. Ct. 2551 (2015), this Court held that the residual clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. In Welch v. United States, 136 S. Ct. 1257 (2016), the Court held that Johnson announced a new "substantive" rule of constitutional law that applies retroactively in an initial collateral challenge under 28 U.S.C. 2255 to a sentence enhanced under the ACCA. 136 S. Ct. 1268. The questions presented in this petition are:

1. Whether, in a vagueness challenge to the use of the residual clause in Sentencing Guidelines § 4B1.2(a)(2) to enhance an advisory guidelines range, Johnson's constitutional rule applies retroactively in a motion under Section 2255.

2. Whether Johnson's constitutional rule applies to the residual clause in Sentencing Guidelines § 4B1.2(a)(2).

3. Whether petitioner's conviction for unlawful possession of a sawed-off shotgun qualifies as a "crime of violence" under the commentary to Sentencing Guidelines § 4B1.2.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-3) is not published in the Federal Reporter but is reprinted at 616 Fed. Appx. 415. A prior opinion of the court of appeals affirming the denial of petitioner's motion under 28 U.S.C. 2255 (Pet. App. A4, at 1-4) is not published in the Federal Reporter but is reprinted at 579 Fed. Appx. 833. A prior opinion of the court of appeals affirming petitioner's conviction and sentence on direct appeal (Pet. App. A8, at 1-15) is reported at 565 F.3d 832.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 2015. A petition for rehearing was denied on February 11, 2016 (Pet. App. A2). The petition for a writ of certiorari was filed on March 9, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2007, following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 360 months of imprisonment, to be followed by five years of supervised release The court of appeals affirmed, Pet. App. A8, at 8, and this Court denied a petition for writ of certiorari. 558 U S. 906 (2009). The district court subsequently reduced petitioner's sentence to 216 months of imprisonment after the government filed a motion under Federal Rule of Criminal Procedure 35(b). D. Ct. Doc. 150 (Jun. 23, 2010). In 2010, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255(a). D. Ct. Doc 151 (Mar. 4, 2013). The district court denied the motion but issued a certificate of appealability. Pet. App. A5, at 1-2. The court of appeals affirmed Pet App A4, at 1-4 Petitioner filed a petition for a writ of certiorari, and this Court granted the

petition, vacated the judgment, and remanded to the court of appeals for further consideration in light of Johnson v. United States, 135 S. Ct. 2551 (2015). 135 S. Ct. 2928. On remand, the court of appeals again affirmed the denial of petitioner's Section 2255 motion. Pet. App. A1, at 1-3.

1. a. On April 11, 2007, Police Detective Diego Castro was patrolling an area of Miami when he saw petitioner loitering in a public housing facility. Castro, who was wearing a vest and shirt identifying him as a police officer, got out of his police car, and petitioner fled on foot. Castro followed petitioner, identified himself as a police officer, and told petitioner to stop running. Petitioner ran into a nearby apartment. Castro heard screams coming from the apartment and knocked on the door. Tiovanni Jones answered and asked Castro to remove petitioner, whom she claimed not to know. Castro took petitioner into custody and placed him in the police car. Pet. App. A8, at 6; 07-15062 Gov't C.A. Br 3-4; Presentence Investigation Report (PSR) ¶¶ 4-5.

Castro then spoke to Jones, who said that petitioner was her boyfriend and sometimes lived at the apartment. Jones said that there was a gun in the bedroom and consented to a search of the apartment. After searching for the gun unsuccessfully, Castro asked petitioner where the gun was located. Petitioner said that there was a shotgun under the mattress. Castro

recovered a sawed-off Browning shotgun from under the mattress. Petitioner later admitted that he was a drug dealer and had acquired the shotgun for protection. Pet. App. A8, at 6-7; 07-15062 Gov't C.A. Br. 4-5; PSR ¶¶ 6-8.

A federal grand jury in the Southern District of Florida returned an indictment charging petitioner with possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1) Pet. App. A8, at 5. A jury convicted petitioner of the felon-in-possession charge. Id. at 8.

b. A conviction for violating Section 922(g)(1) ordinarily exposes the offender to a statutory maximum sentence of ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has at least three prior convictions for a "violent felony" or a "serious drug offense," the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), requires a minimum sentence of at least 15 years of imprisonment and permits a maximum sentence of life imprisonment. See Custis v. United States, 511 U.S. 485, 487 (1994). The definition of "violent felony" in the ACCA includes a residual clause covering offenses that "involve[] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii).

The Probation Office concluded that petitioner was an armed career criminal because his criminal history included at least three qualifying convictions for "serious drug offense[s] " 18

U.S.C. 924(e); see PSR ¶¶ 18, 24, 30, 33, 35, 38. The Probation Office also determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1. PSR ¶¶ 18, 41. Under Section 4B1.1, a defendant is subject to enhanced punishment as a "career offender" when (a) he was at least 18 years old at the time of the offense of conviction; (b) the offense of conviction is a felony that is a "crime of violence" or a "controlled substance offense"; and (c) he has at least two prior felony convictions for a "crime of violence" or a "controlled substance offense." Guidelines § 4B1.1(a). The phrase "crime of violence" is defined in Guidelines § 4B1.2(a) to include a felony offense that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another," or (2) "is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Ibid. The commentary to Section 4B1.2 further identifies other crimes of violence, including "murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, * * * [and] extortionate extension of credit." Guidelines § 4B1.2 comment. (n.1). The commentary also states that "'[c]rime of violence' does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C.

§ 5845(a)," and that "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a)(e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a crime of violence." Guidelines § 4B1.2 comment. (n.1) As a career offender, petitioner's total offense level was 37 and his criminal history category was VI, resulting in an advisory Guidelines range of 360 months to life imprisonment.[1] PSR ¶ 79.

At sentencing, the district court found that the government had "amply established" the prior convictions that subjected petitioner to sentencing under the ACCA. 10/17/07 Tr. 40. The court also ruled that petitioner qualified as a career offender, finding that petitioner's unlawful possession of a sawed-off shotgun was a "felony crime of violence" and that petitioner had "at least two prior felony convictions of a controlled substance offense." Ibid. The court sentenced petitioner to 360 months of imprisonment, to be followed by five years of supervised release. Id. at 43.

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[1] Absent the career offender designation, petitioner's offense level would have been 26 and his criminal history category would have been V. PSR ¶¶ 17, 41. An offense level of 26 and a criminal history category of V would normally produce a Guidelines range of 110 to 137 months of imprisonment, but because petitioner was subject to a 15-year mandatory minimum under the ACCA, his Guidelines sentence without the career offender enhancement would have been 180 months. See Guidelines § 5G1.1(b).

c. The court of appeals affirmed. Pet. App. A8, at 1-15. Among other things, petitioner challenged his designation as a career offender, arguing that the instant conviction did not qualify as a "crime of violence" because he was convicted only of unlawful possession of a firearm by a felon, not of unlawful possession of a firearm listed in 26 U.S.C. 5845(a). Pet. App. A8, at 10-11. Reviewing for plain error because petitioner failed to preserve the argument below, the court of appeals rejected petitioner's claim. Id. at 11-14. The court relied on the provision in the commentary to the career offender guideline that classifies possession of a sawed-off shotgun as a crime of violence, explaining that Guidelines commentary is "authoritative" unless it is "plainly erroneous," inconsistent with the guideline it interprets, or contrary to the Constitution or a federal statute. Id. at 11 n.1 (citing Stinson v. United States, 508 U.S. 36, 45 (1993)). The court noted that petitioner had not objected to statements in the PSR identifying the firearm he possessed as a sawed-off shotgun and found "no error" in the district court's reliance on these "undisputed facts." Id. at 13 This Court denied certiorari. 558 U.S. 906 (2009).

On June 22, 2010, the district court granted the government's motion under Federal Rule of Criminal Procedure

35(b) and reduced petitioner's sentence to 216 months. D. Ct Doc. 150.

2. a. In September 2010, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, arguing that he was incorrectly sentenced as a career offender because his conviction for unlawful possession of a sawed-off shotgun was not a "crime of violence" under Guidelines § 4B1.2. D. Ct. Doc. 151, at 5-10. Petitioner contended that the Eleventh Circuit's ruling in United States v. McGill, 618 F.3d 1273 (2010), that possession of a sawed-off shotgun was not a violent felony under the ACCA, required the same conclusion with respect to the career offender guideline and that the contrary provision in the guideline's commentary was therefore invalid. D. Ct. Doc. 151, at 6-10

The district court initially granted petitioner's Section 2255 motion and stated that it would schedule a resentencing hearing. Pet. App. A6, at 18. The government moved for reconsideration, D. Ct. Doc. 157 (May 30, 2013), citing the intervening decision in United States v. Hall, 714 F.3d 1270 (11th Cir. 2013), in which the court held that possession of an unregistered sawed-off shotgun qualifies as a crime of violence under the Guidelines. In Hall, the court noted that it would "traditionally employ" a "categorical approach" in determining "whether an offense qualifies as a 'crime of violence' under the

residual clause." Id. at 1273; see id. at 1273-1274 & n.3 (court would "only consider whether the prior conviction poses a serious potential risk of physical injury that is similar to the risk posed by one of the enumerated offenses"). Rather than applying that approach to the sawed-off shotgun offense, however, the court ruled that under Stinson, "the definition of 'crime of violence' provided by the Guidelines commentary" was "authoritative" and binding. Id. at 1274 ("the commentary provision violates neither the Constitution nor any * * * federal statute" and "is not inconsistent with, or a plainly erroneous reading of, the guideline text") The district court granted the reconsideration motion, denied petitioner's Section 2255 motion, and issued a certificate of appealability. Pet. App. A5.

b. The court of appeals affirmed in an unpublished per curiam opinion, stating that it was "bound by" its ruling in Hall. Pet. App. A4, at 2-4.

c. On December 2, 2014, petitioner filed a petition for a writ of certiorari arguing that his conviction for possession of a sawed-off shotgun did not qualify as a crime of violence under the residual clause in the career-offender guideline. See Pet. 10-11. On June 26, 2015, this Court held in Johnson that ACCA's residual clause is void for vagueness, and, therefore, imposing an increased sentence under ACCA's residual clause "violates the

Constitution's guarantee of due process." 135 S. Ct. 2928 (2015). On June 30, 2015, this Court granted petitioner's petition for a writ of certiorari, vacated the judgment, and remanded the case to the court of appeals for further consideration in light of Johnson. 135 S. Ct. at 2928; Pet. App. A3.

3. On remand, the court of appeals again affirmed the judgment of the district court denying petitioner's Section 2255 motion. Pet. App. A1 In an unpublished per curiam opinion, the court reiterated its earlier holding that unlawful possession of a sawed-off shotgun qualifies as a crime of violence under the commentary to Guidelines § 4B1.2. Pet. App. A1, at 2-3 (citing Hall, 714 F 3d at 1270). The court explained that this Court's ruling in Johnson "does not control this appeal" because petitioner's career-offender sentence was "based not on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying [petitioner's] offense as a 'crime of violence,'" and Johnson "decided nothing about career-offender enhancements under the Sentencing Guidelines or about the Guidelines commentary underlying [petitioner's] status as a career offender." Id. at 3.

The court of appeals denied petitioner's petition for rehearing en banc, with no judge in regular active service calling for a vote on the petition. Pet. App. A2.

ARGUMENT

1. Petitioner first contends (Pet. 13-20) that this Court should grant review to decide whether, in a vagueness challenge to the use of the residual clause in Sentencing Guidelines § 4B1.2(a)(2) to enhance an advisory guidelines range, Johnson's constitutional rule applies retroactively in a motion under Section 2255. The court of appeals did not address that question, and resolution of the issue would not affect the outcome of this case To obtain relief, petitioner would have to prevail on the threshold question whether Johnson applies to the residual clause in the career offender guideline. He would also have to establish that the court of appeals erred in concluding that the decision in Johnson "d[id] not control" this case because petitioner's conviction for unlawful possession of a sawed-off shotgun qualified as a crime of violence based on the commentary to the career offender guideline. Pet. App. A1, at 3. And that dispositive question -- which concerns the proper application of the commentary to the current career offender guideline -- is not a question of continuing importance because the Sentencing Commission has amended the guideline to move the list of enumerated offenses from the commentary to the

text of the guideline. Accordingly, this Court's review is unwarranted.[2]

a. Petitioner's claim that Johnson applies retroactively in Guidelines cases lacks merit for the reasons set forth in the government's brief in opposition to the petition for a writ of certiorari in Jones v. United States, No. 15-8629. See U.S. Br. in Opp. at 9-26, Jones, supra. We have served petitioner with a copy of that brief.

b. No conflict in the circuits exists over whether Johnson is retroactive in an initial collateral motion under Section 2255 challenging application of the Guidelines' residual clause. Indeed, no court of appeals has yet resolved Johnson's retroactivity in the Guidelines context in an initial Section 2255 motion. The two published court of appeals decisions that have addressed the issue did so in the course of considering applications for authorization to file a second or successive Section 2255 motion. In In re Rivero, 797 F.3d 986 (11th Cir.

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[2] The questions presented in this case are also presented in the petition for a writ of certiorari in Jones v United States, No 15-8629 (Mar. 18, 2016). The question whether Johnson is retroactive (or whether it has been "made" retroactive to cases on collateral review within the meaning of 28 U.S.C. 2255(h)(2)) in cases involving sentences imposed based on the Guidelines' residual clause is presented in the petition for an original writ of habeas corpus in In re Rivero, No. 15-7776 (Jan. 14, 2016) The government filed its brief in opposition to that petition on April 1, 2016.

2015), petition for habeas pending, No. 15-7776 (filed Jan. 14, 2016), the Eleventh Circuit denied authorization to file a successive Section 2255 motion and held only that this Court had not "made" Johnson retroactive for purposes of the gatekeeping provision in 28 U.S.C. 2255(h)(2). 797 F.3d at 989-991; see Mays v. United States, No. 14-13477, 2016 WL 1211420, at *6 (11th Cir. Mar. 29, 2016) (explaining that Rivero resolved only the "narrow" question whether this "Court has explicitly, or by logical necessity, made [the] rule [in Johnson] retroactive"). In In re Encinias, No. 16-8038, 2016 WL 1719323, at *1-*2 (Apr. 29, 2016) (per curiam), the Tenth Circuit granted an application to file a second or successive Section 2255 motion challenging a career offender sentence based on Johnson. The court noted that the applicable "prima facie" standard required only a showing of "possible merit to warrant a further exploration * * * by the district court," and it concluded that the applicant had made a sufficient prima facie showing. Ibid. (citation omitted).

c. In any event, this case would not be an appropriate vehicle to decide the retroactivity question. Petitioner did not raise any claim concerning Johnson's retroactivity in Guidelines cases in the court of appeals, and that court did not discuss the question petitioner seeks to present here [3] This

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[3] The court of appeals issued its decision on remand from this Court without requiring additional briefing, but petitioner did not raise any issue concerning Johnson's retroactivity in

Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted); see, e.g., Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970).

That practice is particularly appropriate here because resolution of the retroactivity question petitioner raises would have no effect on the outcome in this case. After this Court remanded the case for further consideration in light of Johnson, the court of appeals rejected petitioner's claim on the merits, holding that its prior decision in Hall "remains good law" after Johnson and that petitioner was therefore correctly classified as a career offender. Pet. App. A1, at 3; see id. at 2-3. Accordingly, a ruling by this Court that Johnson applies retroactively in Guidelines cases would not assist petitioner, absent review of that additional Guidelines classification issue, which does not merit further review. See pp. 18-20, infra.

Petitioner contends (Pet. 6, 13, 16-19) that a "prompt" ruling from this Court clarifying whether Johnson applies

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his petition for rehearing en banc See 13-13569 Pet for Reh'g at 1

retroactively in Guidelines cases would promote "judicial efficiency" because prisoners must file Section 2255 motions raising Johnson claims by June 26, 2016, to comply with the one-year statute of limitations set forth in 28 U.S.C. 2255(f). See Dodd v. United States, 545 U.S. 353, 357 (2005) (one-year statute of limitations applies to all Section 2255 motions, including successive motions, and it runs from the date of the decision announcing the new right, not a later decision making that right retroactive). Petitioner also notes (Pet. 17) that if the Court fails to resolve the retroactivity question this Term, prisoners who have previously filed a Section 2255 motion will be left with no avenue for relief other than filing an original habeas petition in this Court. But those considerations, without more, do not make it appropriate to grant review of a question that neither the court below nor any other court of appeals has resolved and that would not affect the judgment in this case

2. Petitioner also urges (Pet. 20-27) the Court to grant review to decide whether Johnson's holding that the ACCA's residual clause is void for vagueness applies to the residual clause in the career offender guideline. The government agrees with petitioner that Johnson's holding invalidating the ACCA's residual clause invalidates the identically worded residual clause in the career offender guideline, and the government

has advocated that position in post-Johnson Guidelines sentencing proceedings and in cases pending on direct review as of the date of Johnson's issuance. See, e.g., U.S. Supp. Br. at 3-10, in United States v. Madrid, 805 F.3d 1204 (10th Cir. 2015) (No. 14-2159); cf. Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final"). Petitioner also correctly notes (Pet. 21-22) that a conflict exists among the circuits on the question whether Johnson's holding applies to the Guidelines. Compare United States v. Pawlak, No. 15-3566 (6th Cir. May 13, 2016), slip op. at 5-13 (agreeing with the government that it does); Madrid, 805 F.3d at 1210-1211 (same), with United States v. Matchett, 802 F 3d 1185, 1193-1196 (11th Cir 2015) (disagreeing with the government), petition for reh'g en banc pending, No. 14-10396 (11th Cir. filed Oct. 13, 2015). Cf. United States v. Lee, No. 13-10517, 2016 WL 2638364, at *2 (9th Cir. May 6, 2016) (declining to reach the issue); id. at *10 (Ikuta, J., dissenting) (opining that "the Guidelines residual clause is not void for vagueness" under Johnson, but that the district court committed procedural error in applying that clause).

Despite the disagreement among the courts of appeals, this Court's review is not warranted. Whether Johnson applies to the career offender guideline's residual clause is a question of limited and diminishing prospective importance. The Sentencing Commission has adopted an amendment that deletes the residual clause from the guideline in light of "many of the same concerns cited by [this] Court in Johnson." 81 Fed. Reg. 4743 (Jan. 27, 2016). Absent congressional action, that amendment will take effect on August 1, 2016. Id. at 4741. The question of Johnson's application to the current career offender guideline is therefore likely to be of no continuing importance.

Furthermore, even if the question otherwise warranted review, this case would be a poor vehicle in which to consider it. The court of appeals did not resolve this case based upon an analysis of whether Johnson invalidated the career offender guideline's residual clause. Instead, the court held that Johnson did not affect petitioner's sentence, which was "based on express language in the Sentencing Guidelines classifying [his] offense as a 'crime of violence.'" Pet. App. A1, at 3. Petitioner reads (Pet 26-27) the court's statement that Johnson "decided nothing about career-offender enhancements under the Sentencing Guidelines" and its conclusion that its prior decision in Hall remained "good law" as signaling that the court "expressly limited Johnson to sentences imposed under the ACCA."

(citations omitted). But the court did not explicitly address that issue, nor did it cite the Eleventh Circuit's published decision in Matchett squarely holding that the "vagueness doctrine * * * does not apply to advisory guidelines." 802 F.3d at 1194.

Finally, this case is an inappropriate vehicle for review because even if Johnson invalidated the career offender guideline's residual clause, petitioner would not be entitled to relief unless he also prevailed on his claim that his conviction did not qualify as a crime of violence under the commentary to the guideline. As explained below, that claim lacks merit and in any event is of no prospective importance, given the proposed amendment to the career offender guideline.

3. Petitioner contends (Pet. 28-34) that this Court should grant certiorari to decide whether possession of a sawed-off shotgun is a crime of violence under Guidelines § 4B1.2 because it is listed as a "crime of violence" in the commentary to the guideline and, more broadly, whether the commentary has "freestanding definitional power" independent of the guideline's text. Those issues do not warrant review.

a. First, petitioner's claim involves interpretation of the Sentencing Guidelines and the accompanying commentary. This Court ordinarily does not review decisions interpreting the Sentencing Guidelines because the Sentencing Commission can

amend the Guidelines and commentary to eliminate a conflict or correct an error. See Braxton v United States, 500 U.S. 344, 347-349 (1991). The Commission is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Id. at 348; see United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.") Particularly because the Guidelines are now advisory, id. at 245, this Court's review of the court of appeals' decision applying the career-offender guideline and associated commentary is not warranted.

b. Second, as explained above, the question whether unlawful possession of a sawed-off shotgun qualifies as a "crime of violence" under the current version of the career-offender guideline and commentary has no prospective importance in light of the Sentencing Commission's amendment to the guideline. The amendment moves offenses currently enumerated in the commentary -- including "unlawful possession a firearm described in 26 U.S.C. § 5845(a)" -- to the text of Section 4B1.2. 81 Fed. Reg at 4743 (noting that "[f]or easier application, all enumerated offenses are now included in the guideline at

§ 4B1.2; prior to the amendment, the list was set forth in both § 4B1.2(a)(2) and the commentary at Application Note 1").

c. In any event, petitioner's claim lacks merit Under this Court's decision in Stinson v. United States, 508 U.S. 36 (1993), Guidelines commentary "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Id. at 38. Stinson held that the provision of the commentary to the career offender guideline that excludes ordinary felon-in-possession offenses from the definition of "crime of violence," while not "compelled by the guideline text," was "a binding interpretation of the phrase 'crime of violence.'" Id. at 47. Likewise, the Sentencing Commission's interpretation of "crime of violence" to include unlawful possession of a prohibited weapon -- including a sawed-off shotgun -- "does not run afoul of the Constitution or a federal statute" and "is not plainly erroneous or inconsistent with § 4B1.2." Ibid. (internal quotation marks omitted). Stinson's conclusion that the Commission's determination that certain offenses do not qualify as predicate crimes of violence is valid and "binding" makes clear that the Commission's authority is not limited to construing the specific provisions in the text of the guideline. Even assuming that the career offender guideline's residual clause is no longer viable,

the Commission acted within its authority in defining unlawful possession of a sawed-off shotgun as a qualifying offense for sentencing enhancement under the guideline.[4]

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[4] As petitioner notes (Pet. 29-31), the First Circuit reached a contrary conclusion in United States v Soto-Rivera, 811 F.3d 53 (2016). The court held that, accepting the government's concession that Johnson applied to the Guidelines, the defendant's conviction for possession of a machine gun did not qualify as a "crime of violence" under the career offender guideline. Id. at 60-62. The court reasoned that without the residual clause, there was no "textual hook in Guidelines § 4B1.2(a) to allow for the conclusion that his possession of a firearm constituted a crime of violence," and that the commentary was therefore "inconsistent with the remaining text of the Guideline." Id. at 61-62. The court rejected the government's reliance on the court of appeals' decision in this case, stating that it "need not opine as to whether we believe Beckles was correctly decided" because "Beckles (like Hall before it) was grounded in the very language which the government itself now says must be excised from the Guidelines." Id. at 61. Any conflict between the First Circuit's ruling and the court of appeals' unpublished decision in this case does not warrant review in light of the amendment to the career offender guideline.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2016

No. 15-8544

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v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, via email and first-class mail, postage prepaid, this 13th day of May, 2016.

[See Attached Service List]

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May 13, 2016

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Supervisor, Case Management Section, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov**. Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

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